

# **Exhibit A**

1                   IN THE UNITED STATES DISTRICT COURT

2                   FOR THE DISTRICT OF OREGON

3       FEDERAL TRADE COMMISSION,       )  
4       et al.,                               )

5                   Plaintiffs,               )

6                   v.                               )

7       THE KROGER COMPANY and               )  
8       ALBERTSONS COMPANIES, INC.,       )

9                   Defendants.               )

Case No. 3:24-cv-00347-AN

September 17, 2024

Portland, Oregon

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14                   PRELIMINARY INJUNCTION HEARING

15                   DAY 15 - DEFENDANTS' CLOSING ARGUMENT

16                   BEFORE THE HONORABLE ADRIENNE NELSON

17                   UNITED STATES DISTRICT COURT JUDGE  
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Closing Argument

(September 17, 2024)

P R O C E E D I N G S

(Morning session; proceedings resumed:)

THE COURT: Please be seated.

All right. Go ahead.

MR. WOLF: Thank you, Your Honor.

Three weeks ago, I started my opening statement by talking about the millions of shoppers at thousands of grocery stores who were, through the merger, going to see their grocery bills go down; the associates another those stores were going to see their wages and benefits go up, and historic communities that were going to gain more certainty that their local grocery stores would not be wiped away by global non-union behemoths like Walmart, Costco, Amazon, and Aldi.

Remarkably, through those three weeks, the plaintiffs have almost entirely ignored both these opportunities and these threats. They have also ignored the fundamental task before Your Honor, which is to compare the world with a merger to one without. They've simply ignored the "but for" world. They have not even attempted to challenge the fundamental imperative of the deal. Through nationwide scope and synergies, Kroger could do more of what it does best for almost 100 million families: Provide a no-compromises grocery experience at extraordinary, competitive prices.

Your Honor, we heard some objections in this case



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1 from plaintiffs from time to time saying they were entitled to  
2 the last word, and indeed they are. And today, they're going  
3 to get the last word. You heard they reserved almost half  
4 their time to get the last word. But the reason they get the  
5 last word is because they bear a burden. They bear a high  
6 burden. They bear an ultimate burden of persuasion to  
7 establish their right to the extraordinary and drastic remedy  
8 of a preliminary injunction.

9 If this were a jury trial, Your Honor, you would be  
10 turning to the jury box and instructing those jurors that  
11 attorney argument is not evidence, and that holds true for this  
12 case as well. We just heard plaintiffs' counsel attempt to  
13 paper over enormous dispositive gaps in evidence with  
14 supposition, innuendo, attorney argument, and rank speculation.

15 For example, we just heard counsel talk about the  
16 divestiture, and the vast majority of what she said sounded  
17 more like what they had hoped their expert would be willing to  
18 say, but he simply wasn't; what they hoped the documents would  
19 show, and they simply didn't. The supposition counsel offered  
20 is not evidence. The evidence that is in the record cannot  
21 possibly satisfy the high burden the Government faces in this  
22 case.

23 So let's turn to that evidence, and let's start with  
24 what we know, what really shouldn't be in dispute at this  
25 point. First of all, the grocery market is intensely

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1 competitive. We heard from competitor after competitor,  
2 witness after witness, talk about the intense competition among  
3 grocers, and that has resulted in what has been called a penny  
4 business. Profit margins are in the single low percentages.  
5 We have seen that everybody competes against everybody.  
6 Witness after witness has testified to that straightforward  
7 fact.

8 We also agree with the Government, and we share in  
9 their concern about rising grocery prices. Rising grocery  
10 prices have squeezed budgets. It has made it more difficult  
11 for Americans to put food on the table. Yet it is undisputed  
12 and unexplained by the plaintiffs why they challenge the fact  
13 that Albertsons, who charges 10 to 12 percent more for  
14 groceries than Kroger, should be prevented from benefiting from  
15 those price changes; more importantly, why consumers should not  
16 be entitled to benefit from those savings.

17 We've also learned about Kroger's flywheel. In  
18 simple terms, the idea is Kroger lowers prices. That brings  
19 more customers through the door. When customers come through  
20 the door, that makes those customers more attractive to  
21 advertisers, more information available -- and remember, Kroger  
22 doesn't sell any private information, but Coke and Pepsi want  
23 to know what those customers like. Do they want one-liter or  
24 two-liter bottles? What do they think about the latest diet  
25 cola? That insight then creates money; money of non-grocery

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1 revenue that can be pumped pack into the lowering the prices,  
2 and flywheel keeps rolling. That is Kroger's business model.  
3 That is the key why they are 10 to 12 percent lower than  
4 Albertsons, and that is what this merger is all about: Keeping  
5 the flywheel continuously flowing; keeping prices continuously  
6 coming down.

7 And we've seen that there is no dispute; that that's  
8 exactly what has happened. Witness after witness, document  
9 after document has shown that year after year Kroger has  
10 brought its margins down to the benefit of its customers. They  
11 forgo profits in the short term to ensure survival in the long  
12 term.

13 We saw this chart from the Government showing how  
14 grocery margin and price and cost interact. And in simple  
15 terms, if Kroger had not been reducing its profit margins over  
16 the years, prices would be much higher. The reason they are as  
17 low as they are is because of that flywheel; it's because of  
18 the commitment to lower prices

19 Why? Why are they so singularly focused on lowering  
20 prices? Because they are singularly focused on Walmart.  
21 Walmart is the price leader, and if they don't keep up with  
22 Walmart, as Mr. Groff put it very starkly, they will lose  
23 customers.

24 What we know is that Walmart is the low price leader.  
25 There is no dispute. And what we know, again, is that Kroger

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1 tracks them by every category. In every aisle of every  
2 supermarket, they say, "Some prices, we're going to have  
3 identical to Walmart; some we're going to get very close." But  
4 Walmart is the lodestar. It's the guide for Kroger.

5 And today, Kroger has done pretty darn well. When  
6 Mr. Aitken testified that weighted-active spread, it's down to  
7 three-and-a-quarter percent from nearly triple that two decades  
8 ago. Kroger is succeeding, but it needs the help of this  
9 merger to continue to succeed.

10 My colleague, Ms. Mainigi, will talk about  
11 Albertsons' situation in the "but for" world and why Albertsons  
12 decided it needed to find a merger partner. But Mr. Silva  
13 summed it up very simply:

14 "Will Albertsons be able to catch up with Walmart?

15 "Not under its current structure, no."

16 That's the reality. That's the "but for" world that  
17 the Government even refuses to acknowledge; refuses to even  
18 discuss.

19 What also is known in this courtroom is the growing  
20 competitive threat already overwhelming of Walmart and Costco  
21 and Amazon and Aldi and others, but now an existential threat  
22 to the corner grocery store. If we don't do something, the  
23 corner grocery store is in real danger, and this merger is an  
24 attempt to make sure that the grocery store is there for our  
25 children and our grandchildren and our grandchildren's

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1 children.

2           The other part of this is not just an existential  
3 threat to the grocery store, it's an existential threat to  
4 union labor. The Government has barely addressed the fact that  
5 every sale that Kroger or Albertsons loses to Walmart or loses  
6 to Costco is a sale lost to an industry, to an organization, to  
7 a company that doesn't use unions. If we lose, unions lose.

8           We are not the only ones that see this, Your Honor.  
9 This is not testimony generated for this courtroom. Article  
10 after article discussed in this case and that Your Honor  
11 probably sees every day in her newspaper, supermarkets are  
12 losing this food fight, and we pay a price for that fact. We  
13 pay a price at the corner grocery store. Union labor pays a  
14 price for every dollar of sales that the two companies here  
15 lose to Walmart and Costco and Amazon and Aldi.

16           So those are the facts on the ground. That's what we  
17 know, and that leads to: Why the merger? Why are we doing  
18 this? In order to be successful, Kroger must continue to move  
19 aggressively to lower prices and continue to close that price  
20 gap to Walmart. Why? Because Kroger seeks to be a  
21 no-comprises grocery store at a price competitive to Walmart.

22           The problem is there are only two ways that you can  
23 lower grocery prices: One is to lower costs, and the other is  
24 to increase revenues on the non-grocery side that you can then  
25 feed onto the grocery side to lower prices. Those are the only

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1 two things you can do to lower grocery prices.

2 Kroger is lowering costs -- year over year thousands  
3 of things every day. But there is a limit. There is only so  
4 much cost that can be driven from the system. There is only so  
5 much cost that can be covered without more greater, more  
6 dramatic action.

7 Similarly, Kroger is making revenue on the  
8 non-grocery side, but there are limits to that too,  
9 particularly from the fact that Kroger does not have a national  
10 footprint. If you're Pepsi, and you want to reach a national  
11 audience with your in-store advertising, you have to go to  
12 Kroger and someone else. And so Kroger makes less. And what  
13 it can't make, it can't use to reduce grocery prices.

14 So this is why the merger makes so much sense. You  
15 take two companies with complementary footprints and  
16 complementary cultures, and you combine them. And now you have  
17 the opportunity to both lower costs and increase non-grocery  
18 revenues to the benefit of consumers and union workers and  
19 communities.

20 There really isn't any dispute that the merger will  
21 reduce costs. Of course, it will. It will reduce sourcing  
22 costs and supply chain costs and merchandising and technology.  
23 The two companies will combine and save hundreds of millions of  
24 dollars, billions of dollars every year. Nor is there any  
25 dispute, could there be any dispute that it will increase those

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1 non-grocery store sources of renew.

2           We have seen board documents showing the estimates --  
3 billions of dollars available from the non-grocery side to  
4 support the driving down of grocery costs. And what does that  
5 mean? It means for consumers, prices will go down from day  
6 one, ramping up to a billion dollars a year. And this isn't an  
7 idle promise, an empty promise. Your Honor has seen the  
8 documents that lay out the timeline to the month, to the state,  
9 to the dollar.

10           And these commitments have been made, not in this  
11 courtroom, Your Honor, they've been made to investors. They've  
12 been made to the board. They've been made to the regulators.  
13 And why? Because these investments work. We need to make  
14 these investments to close the gap on Walmart to maintain the  
15 ability to be a no-compromised grocer at a cost that's  
16 affordable to everyone.

17           And at the end of the day, the beneficiaries are  
18 clear: A billion dollars a year in price investments to  
19 benefit customers; a billion dollars of a year in benefits and  
20 wages to help associates; \$1.3 billion to improve Albertsons  
21 stores, all with the commitment of no store closures, no  
22 frontline job losses. 10 billion meals given to those in  
23 need. Tuition reimbursement for associates and a greater,  
24 enhanced focus on local produce, local meats, local goods in  
25 general.

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1           The merger is pretty straightforward, albeit complex  
2     in its detail. At the highest levels, there is no dispute.  
3     Kroger is going to acquire 1,803 stores from Albertsons. C&S  
4     will acquire 485. C&S will acquire an additional 95 stores.  
5     So it will total 579 stores from the two parties. All of this  
6     is reflected in deal documents that are in evidence. All of  
7     this is straightforward. None of this is in dispute.

8           Let's talk about the divestiture. The divestiture --  
9     and my colleague, Ms. Mainigi, will also talk about this  
10    topic -- but the divestiture is intended to set up C&S for  
11    success. We have to. We recognized from the beginning, if we  
12    didn't, we couldn't get this merger through. And so we picked  
13    a party that could get the job done. We gave them the  
14    resources so they could do the job, and you're hear more about  
15    the people that will do that job.

16           There is, however, a little bit of a misnomer in how  
17    the plaintiffs have talked about the merger. You heard this  
18    from Dr. Hill. He said, "I think here it makes sense to look  
19    at what the world would be like it if the divestiture works  
20    perfect."

21           Well, Your Honor, that's not the legal standard.  
22    Nothing works perfectly. Nothing ever has. Kroger doesn't  
23    work perfectly, Albertsons doesn't work perfectly, and C&S  
24    won't work perfectly. That's not the question Your Honor is  
25    going to have to answer. The question is: Does the



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1 divestiture sufficiently mitigate the merger's effect such that  
2 it is no longer likely to substantially lessen competition?

3 That's the standard that needs to be addressed, not perfection.

4           So C&S. We have talked at length about C&S, although  
5 now it feels like six months ago, but it was only two weeks.

6 We heard about their nationwide footprint. They, in fact, have  
7 a larger footprint and three times the store service than  
8 either of our two companies have individually. They are  
9 coast-to-coast from Maine to Hawaii. They are in almost every  
10 state except the mountain west, and they provide services like  
11 every grocery store. They are a great business. They are a  
12 great wholesaler.

13           We heard counsel say, "Well, where is their scale?  
14 Scale, you say, is a benefit of the merger. What about C&S?"  
15 C&S has more scale today than the merger will give the combined  
16 companies.

17           Now, Mr. Gokhale offered -- this is a slide from his  
18 opinion. He was our divestiture expert. He told the Court  
19 that C&S is a strong buyer and is well capitalized, and there  
20 was no contrary evidence. Your Honor, it was on your screen.  
21 Their year-over-year profits -- think about that not just for  
22 any given year, but collectively over the last five years.  
23 They are an extraordinarily profitable, secure, well-funded  
24 company. They did comprehensive due diligence, with a  
25 financial model and business plan that reflected the realities,

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1 the risks, and the opportunities of the deal. Again, no  
2 dispute from plaintiffs' expert.

3 C&S identified the risks. They didn't bury their  
4 head in the sand. They didn't suggest that this was going to  
5 go perfectly, and they didn't need to do anything to make sure  
6 it worked. They identified the risks, and they committed the  
7 money to address them.

8 And Mr. Gokhale testified, when you combine  
9 divestiture package with the existing C&S, you have a  
10 standalone business. And again, there was no dispute.

11 Your Honor, the amount of resources that C&S is  
12 getting from this divestiture is staggering: 579 stores,  
13 banners, distribution centers, a dairy, brands, tech stack  
14 clones, and an extraordinary number of incredibly talented  
15 people. This transaction is enormous, and it is enormous to  
16 set up C&S for success. And it has succeeded in doing so.

17 And to ensure success, there is a TSA, a transition  
18 services agreement, that makes sure that C&S won't be left at  
19 the edge of a cliff; that they will be given time to get their  
20 business up to speed as they see fit to compete against these  
21 two companies here, as they see fit to do so aggressively, to  
22 do with so with vigor, to do so with differentiation, to make a  
23 difference.

24 There were allusions in my colleague's closing to  
25 prior divestitures; specifically, the Haggen divestiture. And

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1 as you heard, this deal was set up to be the anti-Haggen,  
2 starting with financing the package with almost a billion  
3 dollars of equity put in, through the TSA, all the way down the  
4 line.

5 And you will hear my colleague, Ms. Mainigi, talk  
6 about Susan Morris, her team, their talent, their energy, and  
7 their plans, and how they plan to make sure that C&S is an  
8 effective, vital, robust competitor.

9 Your Honor saw the deal documents. You saw the  
10 models, the deal models. You saw a presentation of how it  
11 works. This is not a fly-by-night opportunity. This is not a  
12 fly-by-night company. This is not a half-baked plan. This is  
13 a detailed, thoughtful, well-resourced opportunity for C&S to  
14 enter the next hundred years of its existence, expanding upon  
15 an extraordinary supply network to be a true competitor, the  
16 No. 8 competitor from day one in the grocery industry. From  
17 day one, they will be top ten.

18 It's not just our word that you need to take for it.  
19 You've heard about all the investors that are putting their  
20 money behind this; that are putting their money behind the  
21 opportunity; that have committed -- that if C&S fails, they  
22 fail to the tune of billions of dollars.

23 Your Honor, you also heard some conspiracy theories;  
24 that if C&S doesn't work, they can always sell things off; that  
25 they can always just cut and run. And Mr. Winn was asked

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1 directly about that possibility, and his answer was  
2 straightforward:

3 "It's a bit insulting. We wouldn't be doing  
4 everything we are doing if that was just our plan."

5 And look at the documents, and that makes sense. But  
6 he also pointed out it doesn't work as a matter of math. If  
7 you spend 2.9 billion and only make 2 billion back, you've lost  
8 a billion dollars. That's not a very effective business model.  
9 The Government's theories just don't make sense

10 Speaking of the Government's theories, let's talk  
11 about the plaintiffs' case broadly, what they tried to do here.  
12 In opening, counsel suggested "time permits us to present only  
13 a sliver of the voluminous record." You would think, assuming  
14 that's the case, that they would pick their best sliver; that  
15 they would pick the sliver that persuades Your Honor the most.

16 In fact, what we have been left with is scattered  
17 antidotes, scattered circulars, occasional snarky emails, but  
18 no real evidence of what plaintiffs are trying to prove -- of  
19 what they must prove in this case.

20 And let me start with something that's interesting  
21 that Your Honor might not have had the opportunity to focus on.  
22 There have been references to dividend litigation.  
23 Mr. Sankaran was questioned about this at some length.  
24 Albertsons did a dividend about the time of the merger. At  
25 that time a number of these plaintiffs went into federal courts

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1 around the country and made certain representations about  
2 Albertsons. And this is remarkable given that they want --  
3 they talked about Albertsons in glowing terms, and I think  
4 justifiably so, but this is what they said to other courts in  
5 the dividend litigation:

6 "This payment" -- and remember, that payment did  
7 occur -- "will inhibit Albertsons' ability to compete  
8 effectively during the pendency of the merger review and  
9 beyond, with significant immediate and long-term ramifications  
10 for consumers and workers."

11 In another court: "The dividend will leave shoppers  
12 facing higher prices, worse services, less innovation, or even  
13 closure of their local Safeway or their Albertsons supermarket,  
14 or all of the above."

15 That's what these plaintiffs have said elsewhere, and  
16 that's why it's so important that we recognize that attorney  
17 argument is not evidence. All of this supposition and  
18 speculation we've heard from plaintiffs today and throughout  
19 the trial, well, their track record, frankly, isn't that good.  
20 Let's rely on what the experts say and the witnesses say, not  
21 what the Government presupposes.

22 Now I want to shift gears to the whack-a-mole of  
23 market theory that the Government has put forward. They have,  
24 in fact, during this case offered four different theories of  
25 what the market is. We start with the supermarket theory.

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1 This is what's in the plaintiffs' complaint. And I'll talk  
2 later in my presentation about the legal implications of the  
3 way this all played out in this case, because the legal, due  
4 process evidentiary implications of how they dribbled out each  
5 of these four theories and what it means for Your Honor's  
6 decision-making under the law.

7 But the supermarket theory, that's what is in the  
8 complaint, and that excludes obvious competitors. We will talk  
9 about the supermarket at length, but it excludes Trader Joe's,  
10 it excludes Costco, et cetera.

11 Then they move -- they shifted gears to the  
12 large-format theory, which is utterly geographically  
13 unrealistic. It ignores the fact that a Costco, just a half  
14 mile outside of the circle they drew, has just as much effect  
15 on prices, draws just as many customers as someone inside the  
16 circle.

17 Then we see a shift of gears to this one-stop theory,  
18 and we are not even entirely clear how the one-stop shop theory  
19 interacts with the supermarket and large-format market  
20 approach. But that theory excludes places where you can't get  
21 a half gallon of milk or six ounces of salmon.

22 And then finally, we have the CMCR approach that we  
23 will talk about at some length. The CMCR approach, with the  
24 right input, just proves the lack of economic harm from this  
25 deal; in fact, the economic benefit.

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1 But interestingly and frustratingly, I asked the  
2 expert Dr. Hill:

3 "Your view of the world is different than the  
4 Government's view of the world, isn't it?

5 "ANSWER: I don't know what their exact view of the  
6 world is."

7 So, Your Honor, I don't use the word "whack-a-mole"  
8 flippantly. I don't know whether we're supposed to accept what  
9 Dr. Hill says the market is, what the Government said in the  
10 complaint is the market, what they said today is the market,  
11 although even listening today, I'm not exactly sure what it is.  
12 But ultimately we're going to have to collectively decide  
13 whether they picked the right market, and they haven't told us  
14 which market we are supposed to pick from.

15 Indeed another confusion here is that the Federal  
16 Trade Commission has a very different view of the market than  
17 the White House does. The White House has told us that Aldi  
18 and Amazon and Walgreens are in the market, while the Federal  
19 Trade Commission says they're not.

20 There are also fundamental misunderstandings of  
21 economics, and this is just one example, Your Honor, replete  
22 throughout this case. We heard in opening remarks that the  
23 price investment committed, the billion dollars, is 1/150th of  
24 revenue. But, Your Honor, you don't spend revenue. You can't  
25 spend revenue. You can only spend what you take home at end of

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1 the day. You can only spend profit. And this is a penny  
2 business. And our profits are \$3 billion or \$4 billion a year.  
3 So we have committed to spend roughly a quarter of the profit  
4 we make to bring down prices if this merger goes through. To  
5 trivialize that, to suggest that that's not an important  
6 commitment, that that doesn't matter, just simply belies  
7 economics and belies common sense.

8 So now let's shift to plaintiffs' evidence; what  
9 they've done in this case. We are going to talk individually  
10 about each of the four experts in support of their position,  
11 but they've also called a number of witnesses that at the end  
12 of the day ultimately supported the defendants' position,  
13 supported the view of the market that Kroger and Albertsons  
14 have put forward in this case, supported the view of  
15 competition that Kroger and Albertsons have put forward in this  
16 case, supported our view of the effects of the merger that  
17 Kroger and Albertsons have put forward in this case.

18 What do I mean? Well, let's start with what matters  
19 here. The principal objective of antitrust policy is to  
20 maximize consumer welfare by encouraging firms to behave  
21 competitively; help consumers by increasing competition.

22 So who did we hear from first? The Government called  
23 Stater Brothers and Raley's and Sprouts, competitors of ours.  
24 And each of them testified that if this merger goes through, it  
25 will hurt them because they will have to lower their prices,



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1 but, of course, that's exactly what's supposed to happen.  
2 That's exactly what the antitrust laws are supposed to  
3 encourage. Stater Brothers, of course, is opposed to this  
4 merger. Raley's is, of course, opposed to this merger, because  
5 lower prices at Kroger means competitive pressure on them,  
6 which means they need to lower their prices to the benefit of  
7 consumers. Stater and Raley's, at the end of the day, just  
8 prove our point. In fact, Dr. Hill acknowledged this:

9 "And you would agree, if prices came down at those  
10 former Albertsons, that that would in turn have a positive  
11 knock-on effect of putting pressure on Stater Brothers and  
12 Raley's and Sprouts and everybody else to lower their prices to  
13 compete, right?

14 "If they went down to what they otherwise would have,  
15 yes, that would put pressure on others."

16 Dr. Hill admitted one of the primary benefits of this  
17 merger outright.

18 Your Honor, most interestingly about this is what the  
19 Government has chosen to put on vis-à-vis the consumer. We  
20 have not heard from the consumer in this case. Remember, this  
21 case is all about the consumer. This challenge is all about  
22 what's best for consumers. But no one got on that stand would  
23 was an actual consumer. The Government didn't call a consumer,  
24 a consumer representative, a consumer advocacy organization.  
25 We hear counsel testify what consumers want. We didn't hear

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1 from consumers what they want. We didn't hear from consumers  
2 what would benefit them.

3 Attorney argument is not evidence. Evidence is  
4 evidence. And when you have extraordinary burden they have,  
5 you would have suspected -- you would have suspected they would  
6 put consumers on the stand, or representatives of consumers, to  
7 tell us how this merger would hurt them. Instead, silence.

8 Then we get this weird by-play about who the consumer  
9 actually is. Who is the consumer that Your Honor is supposed  
10 to care about?

11 Raley's says, "We want people who are knowledgeable  
12 workers within the store to help you pick a ripe melon. Their  
13 customers are not people who want to suffer in a Costco parking  
14 lot on a Saturday and Aldi shoppers who have a different  
15 shopping mission." Raley's apparently isn't concerned with  
16 those folks.

17 Stater Brothers. Their customers are -- and we put  
18 this down verbatim: "35- to 45-year-old female head of  
19 household with a family." Their customers are not Aldi or  
20 Walmart or Costco or "that type of customer who is so focused  
21 on price."

22 Counsel in her closing talked about those customers  
23 for whom a bus trip might be expensive; for those customers who  
24 a car trip might be prohibitive; those customers for whom  
25 Costco's membership fees might be significant. Yet they call

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1 witnesses, as their first witnesses, who explicitly stated  
2 they're not targeting those customers. Do you know who is  
3 targeting those customers? Kroger and Albertsons.

4 We asked Mr. Aitken, "Are you limited to a  
5 stereotypical big-family, middle-America, suburbia kind of  
6 customer?

7 "Absolutely not. We serve 60 million households a  
8 year. We have learned that 9 million of those customers pay  
9 with SNAP or WIC." Simply put, Kroger accepts its customers  
10 regardless of the size of their wallets."

11 Your Honor, when we say who are the customers that  
12 this merger benefits? It is the customers who are in the  
13 Costco parking lot. It is the customer who is shopping at  
14 Aldi. It is the customer who is paying with WIC and SNAP.  
15 That's who this merger is for.

16 Who else didn't the Government call? Remarkably,  
17 they didn't call Walmart. They didn't call Costco. They  
18 didn't call Amazon. It was up to us, as defendants.  
19 Collectively those three companies make up the vast majority of  
20 grocery sales. Walmart alone is three times the size of either  
21 Albertsons or Kroger. But the Government didn't want to hear  
22 from them. Why? Well, obviously because it undermines the  
23 Government's case, and so it was left to us.

24 How about the experts? Dr. Hill, indisputably an  
25 esteemed economist. Your Honor was treated to two of the best

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1 economists out there in this case. But it's remarkable what  
2 Dr. Hill didn't consider or didn't remember. There's a list on  
3 the screen. It will all be in the briefing. But most  
4 importantly, he didn't even consider in his analysis the  
5 potential impact of the price investment that is the very  
6 purpose of this merger. He simply refused to consider it.

7 He also didn't remember things that are really,  
8 really important. For example, remarkably, he didn't remember  
9 that Albertsons' prices are higher than Kroger's. He didn't  
10 remember that, in fact, they were 10 to 12 percent higher than  
11 Kroger's. How can you do an economic analysis of this merger  
12 without knowing whose prices are higher than whose? How is  
13 that even possible?

14 How about Dr. Fox? Now, here's where we get back to  
15 "attorney argument is not evidence." Dr. Fox was the --  
16 counsel referred to "paid experts." I'm pretty sure that  
17 experts on both sides of the aisle here were paid. Dr. Fox was  
18 the expert plaintiffs chose to talk about the divestiture,  
19 despite the fact that he had never worked on a divestiture. He  
20 had never studied divestitures. He had no knowledge of  
21 private label practices and no knowledge of past divestiture  
22 deals. And still, remarkably, he wouldn't offer the opinion  
23 that plaintiffs wanted him to offer.

24 "Professor Fox, you never concluded in your expert  
25 reports that C&S is likely to fail as a divestiture buyer, do

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1     you?

2                     "No. I rendered no opinion on the likelihood of  
3     failure."

4                     There is no one in this case, other than the  
5     attorneys, who have said that C&S is going to fail -- no one.  
6     No one.

7                     How about efficiencies, a very important part of this  
8     case we will talk about in a few minutes? Who did they choose  
9     to call as their efficiencies expert? A person who never  
10    before has offered an opinion regarding efficiencies; a person  
11    who never advised a company on merger transactions, who  
12    couldn't tell us what standards he used. And here is the punch  
13    line, he didn't offer any opinion on the amount of  
14    efficiencies. So just like Dr. Fox, he couldn't say whether  
15    C&S would or would not work, Dr. Yeater couldn't say whether or  
16    not the efficiencies would or would not be attained.

17                    Finally, Dr. Ashenfelter. Again, like all their  
18    experts, esteemed in their field, but, remarkably, doesn't  
19    offer an opinion on what matters in it case.

20                    "Professor Ashenfelter, is it true that you are not  
21    offering any opinions in this case that the proposed  
22    transaction between Kroger and Albertsons is likely to  
23    substantially lessen competition in any relevant labor market?

24                    "ANSWER: Yes."

25                    Three witnesses, three topics, three non-answers.

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1 They chose the witnesses they chose. They paid the experts  
2 they paid. And they still wouldn't testify what the Government  
3 needed them to testify to to win this hearing. Rather, the  
4 vast majority of what you saw in this case and what you just  
5 saw in plaintiffs' presentation was anecdotal evidence.

6 Alternatively, we provided you with the company  
7 documents, board presentations, investor presentations, board  
8 minutes, government presentations, business plans, the  
9 agreements themselves. We presented you with data, market  
10 share data, share of wallet data, customer service data,  
11 price-check data, pricing data, et cetera.

12 Critically, we also gave you -- now, most of this was  
13 on the private screen, as Your Honor will recall -- documents  
14 from other grocery retailers -- their data, their information,  
15 their statements within the company as to who they viewed as  
16 competitors; what they viewed as the market.

17 We also provided you with anecdotal evidence, but we  
18 informed that anecdotal evidence with witnesses who spent a  
19 combined 307 years in the grocery industry. We brought people  
20 here and sat them on that stand who worked their way up from  
21 box checker and checkout clerk to CEO, to COO, to division  
22 manager, whatever the case may be. We brought folks here that  
23 could talk about the industry, that could talk about the  
24 business, that could talk about what the world is, what the  
25 world is becoming, and why this merger is so important to these

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1    respective companies in face of what is coming around that  
2    corner; in fact, what has already turned the corner:  And  
3    that's Walmart.  That's Amazon.  That's Costco.  That's Aldi.  
4    That's the threat to the corner grocery store.

5               Your Honor, I go back to plaintiffs' opening  
6    statement:  "Time permits us to present only a sliver of the  
7    voluminous record."  And respectfully, what plaintiffs have  
8    presented us is just that -- a sliver.  And that sliver cannot  
9    possibly meet their burden of proof.

10              Now let's turn to the preliminary injunction standard  
11    itself.  The four factors that are relevant -- and again, it's  
12    an extraordinary and drastic remedy requiring a clear showing  
13    as to each of the factors.  And like I did in my opening, let  
14    me start with the public interest.  And it is important here to  
15    recognize that the public interest is the most important thing  
16    for Your Honor to consider.  Even if they prove a likelihood of  
17    success, if we show the public interest favors this merger, the  
18    merger should go through, because this is all about consumers  
19    at the end of the day.  If this will benefit consumers, as we  
20    believe it unambiguously absolutely certainly will, then the  
21    merger should go through.

22              And I talked about the "but for" world, the "but for"  
23    world that plaintiffs refuse to face.  This case hinges -- and  
24    this is from Baker Hughes on their transactions' probable  
25    effect on future competition.  And I asked Dr. Hill:

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1            "And you would agree with me that the fundamental  
2 question of merger analysis is what's going to happen to prices  
3 in a world where there is a merger versus a world where there  
4 isn't a merger, right?

5            "That's fair."

6            That's the decision that needs to be made, all in the  
7 context of what Mr. McMullen said -- and I don't think there  
8 any dispute -- in business, once something is obvious, it's too  
9 late.

10           So what does the world look like with the merger?  
11 For new Kroger customers, those customers formerly of  
12 Albertsons, they're going to see lower margins, lower prices,  
13 revitalized stores, fresher foods, an enhanced store and  
14 fulfillment network, improved data and tech capabilities, like  
15 loyalty programs, and a broader supplier base to bring a more  
16 diverse set of products to their shelves. All of that is  
17 undisputed. All of it, I repeat, is undisputed.

18           How about existing Kroger customers, the folks that  
19 shop at Kroger today? They're going to see fresher food,  
20 improved supply chain, more merchandise. We heard, for  
21 example, that Albertsons does better with certain kinds of  
22 ethnic foods. That's now going to benefit Kroger.

23           Reduced costs. Increased revenue to fuel that  
24 flywheel, to allow us to drive margins down even lower.  
25 Continued lower margins. Improved customer experience.



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1           How about the new Kroger associates, the ones that  
2           used to be at Albertsons stores? They're going to higher  
3           wages, greater benefits, tuition reimbursement, and an  
4           assumption of every CBA

5           Now, what about C&S? What about the stores that C&S  
6           is going to run that used to be run by Albertsons? They're  
7           going to see lower prices. You heard from Mr. Winn about the  
8           price investment commitment that C&S has made. They will see  
9           expanded private label selection, improved localized  
10          assortment, infrastructure. "Billions of dollars," Mr. Winn  
11          testified to, improve the stores that C&S acquired from  
12          Albertsons. An expanded distribution network. This is all  
13          going to sit upon the extraordinary distribution network that  
14          C&S has in place today and has run for more than a century.  
15          And improved IT systems

16          It's not just new C&S customers, though, that will  
17          benefit. Remember, C&S services 7,500 stores today,  
18          mom-and-pop stores, many of them. Those mom-and-pop stores are  
19          going to benefit from this merger, because C&S will now have  
20          all of the benefits, all of the resources that it receives from  
21          the merger that it can not only use in its own stores, but that  
22          it can use with the wholesalers.

23          And finally, think about everybody else that shops  
24          everywhere else. Kroger is going to be putting downward price  
25          pressure from day one. And Stater Brothers, Raley's, Costco,

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1 Walmart, Sprouts, Trader Joe's, Whole Foods, every one of those  
2 stores is going to have to respond to the price pressure that  
3 Kroger is going to put upon them.

4 And who benefits from that? Consumers. Consumers,  
5 not just of these two companies, but of everyone that buys  
6 groceries in the United States. Everyone that buys groceries  
7 in the U.S. will see their prices go down, assuming the stores  
8 they shop respond to our lower prices, and if they don't, do  
9 you know what those consumers are going to do? They are going  
10 to vote with their feet and come shop at Kroger.

11 Now, what about if there is no merger? Well, all  
12 those benefits I just talked about are going to go away.  
13 They're just not going to happen. We are going to lose the  
14 check to rising grocery prices, and perhaps most importantly --  
15 well, maybe not most importantly -- but still critically, the  
16 dominance of Walmart and Costco and Amazon will continue  
17 unchecked. The threat to the corner grocery store; the threat  
18 to union labor will be unchecked. There can be no real dispute  
19 that this merger will help consumers, the very consumers that  
20 the Government didn't want to hear from in this case.

21 Let's talk about the two factors likelihood of  
22 irreparable harm and balance of harm. This case will decide  
23 the fate of the merger. You heard Mr. Cosset explain why. But  
24 again, I want to address statements being made by these  
25 plaintiffs, again, in a different proceeding outside this

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1 Court. You've heard counsel multiple times tell you that all  
2 they want Your Honor to do is press the pause button, to hit  
3 "stop" so the FTC and the Part 3 proceeding can do its job. So  
4 it's really not that important whether this PI issues or not,  
5 because someone else will ultimately decide the fate of the  
6 merger.

7 Your Honor, as we speak, there is litigation going on  
8 in the Southern District of Ohio about the FTC's jurisdiction,  
9 and in that case the FTC is represented -- they're a party, but  
10 they're represented by the Department of Justice. And look at  
11 what the Department of Justice has said about these claims by  
12 the Government, by the plaintiffs, that this is just a pause;  
13 that this really isn't a decision that will make a difference  
14 to the merger.

15 Furthermore, the administrative proceedings, known as  
16 Part 3 proceedings, "may well be adjourned or vacated entirely  
17 based on the outcome of the FTC's concurrent action in the  
18 District of Oregon." And do you know what? The Department of  
19 Justice is absolutely right. This is what matters. This is  
20 what will decide the fate of the merger. The FTC knows that.  
21 The FTC is telling other courts that that's the truth; that  
22 that's the fact.

23 So now let's turn to the likelihood of success. The  
24 Baker Hughes framework is straightforward. First, you need to  
25 define a product market. If you define the product and the

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1 geographic market correctly, then you go on and ask: Have the  
2 defendants shown that there is no threat of substantial  
3 anticompetitive effect? And once we do that, the burden, which  
4 is always on the Government, have they shown that there will be  
5 anticompetitive effect? So let's take these one at a time.

6 And remember, the ultimate burden of persuasion  
7 remains on the Government at all times. That sliver of  
8 evidence needs to overcome that burden. And there are five  
9 independent reasons why the plaintiffs cannot meet their  
10 burden: They have not properly defined any market; Walmart  
11 constrains Kroger pricing and will continue to do so post  
12 merger; real-world data shows Albertsons does not affect  
13 Kroger's pricing; the competitive-effects analysis, the GUPPI  
14 and CMCER show no harm to competition; and that efficiencies  
15 offset any harm to competition, if it exists, which, as I said,  
16 it doesn't.

17 So first, market. Plaintiffs have not properly  
18 defined any market. And this is critical. The law is clear.  
19 A plaintiff must accurately define the relevant markets, and  
20 failing to define a relevant market alone is fatal to an  
21 antitrust claim.

22 And what do we mean by "a market"? It's a simple  
23 question. This is from Dr. Hill's slide, but there is no  
24 dispute -- excuse me, Dr. Israel -- but Dr. Hill didn't  
25 dispute. It's if we attempt to increase prices or reduce

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1 quality as a result of the merger, where would shoppers turn?  
2 If they would turn to someone in that circumstance, then  
3 they're part of the market.

4 So let's talk first about the supermarket market. It  
5 plainly excludes relevant competitors. It excludes  
6 Trader Joe's and Costco and Sam's and Whole Foods and Aldi and  
7 Lidl and Sprouts and Amazon.com, all of whom Your Honor has  
8 heard again and again and again are options for shoppers in  
9 this market.

10 Who rejects the Government's supermarket market?  
11 Well, Kroger rejects it. You saw our documents. You heard our  
12 testimony. That's not the world in which we live in. That's  
13 not the reality of the grocery market at all. You will hear  
14 from Ms. Mainigi that Albertsons rejects the supermarket  
15 market. In fact, all competitors reject the supermarket  
16 market. We heard from Whole Foods and Amazon and Walmart and  
17 Ahold and Costco, all of whom said that this supermarket market  
18 is way too narrow. You're excluding people that we compete  
19 against every single day.

20 You know, taking a step back, what are they really  
21 saying? Just think about it from the apples' perspective:  
22 Kroger, they include. But we're going to exclude Aldi, because  
23 they don't have enough different types of apples. Sure, they  
24 have apples, but not enough. And how about Costco? Sure, they  
25 have apples, but you can't buy just one. You have to buy ten,

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1 and we're going to exclude them because of that. And how about  
2 Sprouts? Well, we are not really sure why we are excluding  
3 Sprouts, but maybe they're too organic. Maybe because they're  
4 too healthy. Maybe because they have too many choices of  
5 apples. I'm not even sure why that is the case.

6 That Goldilocks approach to marketing is unsupported  
7 by the case law, and, more importantly, it's unsupported by the  
8 facts on the ground that every single competitor in this case  
9 has testified to.

10 Your Honor has seen probably too many examples of  
11 this graphic, the share of wallet data. I won't belabor it,  
12 but this is just from Kroger's perspective. We lose more than  
13 50 percent of our grocery dollar sales to Costco and to Sam's  
14 and to Sprouts and to Whole Foods and to Aldi, and they exclude  
15 all of it from the market.

16 Here is a very straightforward example: Plaintiff  
17 acknowledges that Super Target and Walmart are in the market.  
18 Super Target and Walmart account for about 12.7 percent of our  
19 diverted sales. But Sam's and Costco actually account for more  
20 than that, and they're excluded from the market. Why? There  
21 is simply no explanation. There can't be, because Sam's and  
22 Costco are in the market. They do compete with us every single  
23 day.

24 Similarly, Target, 5.3 percent diversion. Sprouts,  
25 Whole Foods, Trader Joe's, exactly the same number, yet they're

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1 excluded from the market when Target is included. Without  
2 justification, without explanation, they're in the market.

3 Here is another form of analysis of data that was  
4 done. So here, Dr. Hill is asked: If Kroger is in a market  
5 and a new store enters that market, how much does Kroger lose  
6 in sales to that new store?

7 Well, if Albertsons comes to a market, Kroger loses  
8 about 5 percent of sales. If Walmart comes to a market, we  
9 lose more than that; about 6 percent. Both of those are in the  
10 Government's supermarket market.

11 What about Costco, who is excluded? We lose  
12 5 percent to Costco when they enter a market, the exact same  
13 number as Albertsons. Again, without explanation, without  
14 logic, without common sense, why is Costco not included in the  
15 supermarket market? Of course it should be.

16 Now, here, I'm going to turn to the one-stop shopper  
17 market. And I'm not, frankly, sure what role this plays in the  
18 case. I don't know whether the Government thinks it reinforces  
19 the supermarket market, whether it's an alternative market,  
20 whether it's supposed to sit on top of the grocery market. I  
21 don't really know what it's doing here. But what I do know is  
22 it doesn't make a lot of sense.

23 Remember, the FTC told us the relevant antitrust  
24 question is for those consumers who value a one-stop shop  
25 supermarket experience, which companies offer reasonably

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1 interchangeably substitutes for that purpose? Your Honor may  
2 recall, I asked Dr. Hill for 15 minutes about one-stop  
3 shopping. He actually grew exasperated with me. "No, I didn't  
4 analyze one-stop shopping at Amazon or at Costco or at Aldi,"  
5 and concluded, "I don't know what else the Government says  
6 about one-stop shop. I'm not sure what they did." He doesn't  
7 know why they're talking about one-stop shopping. "I didn't  
8 look at the 'one-stop shop' definition for anticompetitor."

9           So the Government is talking about it. Dr. Hill  
10 refused to talk about it. He didn't want to talk about it. As  
11 I said, he grew exasperated when I insisted on talking about  
12 it. What role does it play? Well, we really don't have to  
13 worry about that question, because it's an archaic concept in  
14 today's world. We heard witness after witness say, "One-stop  
15 shopping may have been relevant 20 years ago, 30 years, and  
16 briefly for the pandemic, because people wanted to limit the  
17 number of public exposures they had, but it's just not the  
18 reality of today."

19           The reason, in any event, why we don't have to  
20 consider it is, everybody is a one-stop shop. Everybody we  
21 see. Of course, Kroger is. Albertsons is. Walmart is.  
22 There's no dispute about that. But all the folks that they  
23 exclude from their supermarket market -- Costco, Sam's Club,  
24 Whole Foods, Trader Joe's, Aldi, BJ's, Lidl, Sprouts -- all of  
25 them, with the exception that we amusingly talked about with



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1 BJ;s and alcohol -- all of them satisfy that "one-stop shop"  
2 definition. That's hard to say.

3 And when I asked Dr. Hill about this, whether he  
4 challenged this notion, he responded, "I don't recall this  
5 chart, so I definitely didn't rebut it."

6 So why are we talking about one-stop shopping? We  
7 are done, Your Honor -- to be clear, the supermarket market  
8 fails, according to the witnesses, according to the  
9 competitors, according to the data. There is no such thing  
10 anymore as a supermarket market. And under the law, we are  
11 done. We can stop. There is no likelihood of success.

12 Let's now talk about their second market. What if  
13 you say, "Well, at least let me think about the large-format  
14 market." We have heard a lot about that in this case. What  
15 role does it play?

16 Now, this is where we get to issues of due process  
17 and defendants' rights. I asked Dr. Hill: "You agree that in  
18 the complaint the Government does not allege that the  
19 large-format market is the market we should be talking about,  
20 right?"

21 "Correct.

22 "And in the preliminary injunction motion, the  
23 Government doesn't suggest that the large-format market is the  
24 market we should be talking about?

25 "I believe that's correct."

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1           So we have the Government sue us and say that we are  
2 violating the antitrust laws in light of the supermarket  
3 market. We have them file a preliminary injunction motion,  
4 where they say, "Here are the reasons Your Honor should enjoin  
5 the merger based on the supermarket market." And then we have  
6 an expert witness who has already said that he doesn't even  
7 know what the Government is talking about half the time,  
8 saying, "Well, okay. I'm now going to throw into the hopper a  
9 new market, a large-format market."

10           The Government never amended their complaint. They  
11 never went back and amended their preliminary injunction  
12 proceeding. And the law is pretty clear: When they don't,  
13 it's not part of the case. They have to put us on notice of  
14 what their theory of the case is, not an expert, who time and  
15 again says, "I don't know what the Government says about X, Y,  
16 or Z." It doesn't matter what the Government's expert theory  
17 of the case is. It matters what the plaintiffs' theory of the  
18 case is. And plaintiff didn't put this theory of the case in  
19 either their complaint or their preliminary injunction motion.

20           But even if they had, the large-format market falls  
21 under its own weight. Why? Because those circles that you  
22 have seen so often over the last three weeks don't make any  
23 sense.

24           Here is the most basic example: In Portland, Oregon,  
25 Dr. Hill drew a circle around the Fred Meyer in Portland and

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1 excluded from that Fred Meyer market the Costco a half mile  
2 out, likely the Costco that provided the Government's water in  
3 this case.

4 But Dr. Hill, their own witness, admitted that that  
5 Costco was a competitor to Fred Meyer. In fact, he admitted it  
6 was the biggest competitor to that Fred Meyer. Remember,  
7 Your Honor, there were the concentric circles -- this was on  
8 Friday.

9 "Confirm for me, please, that in both markets Costco  
10 is the single biggest competitor to Kroger, but in the  
11 store-based market, the circle market, you don't even consider  
12 it, right?

13 "Correct."

14 So you see Costco has 14 percent. The largest other  
15 competitor is 13 percent in that outer wheel. That's  
16 Albertsons. So that circle-based approach in the real world,  
17 in this city, excludes the single biggest competitor to Kroger.  
18 That makes no sense. That's inconsistent with the law.

19 And why? Because we know, as a matter of fact, as  
20 witness after witness has testified, as the data shows, people  
21 are willing to drive a little farther to Costco and to Walmart  
22 and to Target than they are to their neighborhood grocery  
23 store. And so if you draw a circle based on how far people are  
24 willing to drive to Kroger or Albertsons, you're going to  
25 exclude the folks that are willing to drive a little further.

Closing Argument

1 Now, when the question is, what happens if Kroger raises their  
2 prices? Can Kroger raise their prices without being punished?  
3 That's the fundamental question here. We know that if Kroger  
4 raises their prices with a Costco just half a mile outside of  
5 that circle, the customer is going to say, "Hey, Kroger, go to  
6 heck. I'm going to drive to Costco, and I'm going to buy my  
7 water there."

8 It's not just a problem of distance. It's a problem  
9 of the geometry itself, the circle. A circle makes no sense.  
10 Walmart was asked straight up:

11 "Is a trade area a circle?"

12 "ANSWER: It is not a circle."

13 Stater Brothers: "You look at a combination of  
14 factors when deciding who you compete with, what's in your  
15 trade area. It's in a lot of things -- geography, highway  
16 infrastructure, the nature of competitors." That's all true.  
17 That's all undisputed.

18 Mr. Aitken cleverly said, "It's not a circle. It's a  
19 splat." And what did he mean by "a splat"? Let's look at,  
20 again, a real-world example. Here is Corvallis, Oregon. We  
21 see the circle that Dr. Hill drew around Corvallis. It's  
22 6.14 miles that excludes all those stores up in Albany. But  
23 when you look at where those people that shop at that  
24 Fred Meyer in the center of the circle of Corvallis actually  
25 shop, 22 percent, almost a quarter of their shopping, occurs

Closing Argument

1 outside the circle up there in Albany at the Safeway and the  
2 Target and the Walmart and the Costco up there, and there we  
3 see that gray blotch, or as Mr. Aitken would call it, "a  
4 splat." That's what it actually looks like. That's what the  
5 geography actually is.

6 We also have the problem of simple overinclusiveness,  
7 the approach that Dr. Hill took. It's the simple example used.  
8 There's an Albertsons at the top of the circle. 50 miles away,  
9 there's a Kroger. According to Dr. Hill, someone would drive  
10 50 miles, skipping the other 549 stores in between, to go to  
11 those two stores. The circle approach doesn't make sense.

12 And you know what? I think plaintiffs agree, because  
13 they barely talked about it in their closing. Instead, the  
14 slide they showed you, and you can go back and look, was based  
15 upon what Dr. Hill called a "customer-based approach," the  
16 fall-back approach. And here, we have another fundamental due  
17 process problem, another fundamental problem with the high  
18 burden they face, the fundamental problem with the approach the  
19 Government has taken with the whack-a-mole markets that they've  
20 offered.

21 Dr. Hill. "And you can confirm for me that the  
22 customer-based geographic market -- that's the market  
23 plaintiffs relied upon just an hour ago -- is nowhere in your  
24 opening expert report, right?

25 "ANSWER: That's correct."

Closing Argument

1           So now we have a geographic market that's not in the  
2 complaint, not in the preliminary injunction motion, and not  
3 even in the expert's opening report.

4           Now, Your Honor may remember that we asked Dr. Israel  
5 about this, and plaintiffs correctly objected. "Objection,  
6 Your Honor. Beyond the scope of his expert report." And, of  
7 course, it was, because Dr. Hill submitted a report.  
8 Dr. Israel responded. Dr. Hill then submitted a reply report.  
9 Dr. Israel didn't have a surreply right. And it was in that  
10 report that he brought up this customer-based approach that now  
11 the Government is putting all of their marbles in -- I don't  
12 know what the metaphor is, Your Honor -- all of their chips on.  
13 I'm not a big roulette player, but I think that's the right way  
14 to phrase it. But they're putting all of this on something  
15 that wasn't raised until their expert's rebuttal report, not  
16 mentioned in their complaint, not mentioned in their PI. And  
17 even then, there's a fundamental problem with the  
18 customer-based approach.

19           I asked Dr. Hill: "To calculate customer-based  
20 market shares, you look at customer location, right?"

21           "ANSWER: Correct.

22           "At least for the majority of the competitive stores  
23 you did not have customer information about where they lived,  
24 right?

25           "Correct."

Closing Argument

1           So although Dr. Israel had no opportunity to respond  
2 on the stand, although they didn't raise it until their reply  
3 expert report, although it doesn't show up in any of their  
4 pleadings, at least their initial pleadings, even then, this  
5 approach falls under its own weight, and this is probably the  
6 nature of the fact they brought it up on reply. He couldn't  
7 get the data in time, so he put in a half-baked approach.

8           So even if you allow them, which, frankly,  
9 Your Honor, we believe you shouldn't, respectfully, to raise  
10 the large-format market at this stage, that fails too. Again,  
11 we can stop.

12           All right. But let's assume you agree with them --  
13 against the evidence, against the law; okay, at least I want to  
14 look for and see what the competitive effects are within a  
15 market. What do we have there? The question is: Are there  
16 anticompetitive effects? And the answer is no.

17           Now, you saw five or ten slides in plaintiffs'  
18 presentation about head-to-head competition, and that's really  
19 a red herring, Your Honor. As the law says, "The mere fact  
20 that a merger eliminates competition between the firms  
21 concerned has never been a sufficient basis for illegality,"  
22 nor could it, because then every merger would be blocked. The  
23 question is not: Is a head-to-head competitor eliminated? The  
24 question is: As a result of the merger, is competition  
25 substantially diminished?

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1           Why isn't substantial competition diminished? Well,  
2 the first reason and the most important reason and unrebutted  
3 reason is Walmart will remain after the merger. Walmart will  
4 remain to constrain prices. Your Honor will remember that  
5 Dr. Israel put a chart next to him with four conclusions. The  
6 first one was "Walmart constrains Kroger's pricing and will  
7 continue to do so post merger." That was his No. 1 conclusion.  
8 That reason alone would support the merger, would preclude the  
9 entry of this preliminary injunction. And do you know what  
10 Dr. Hill said when he was called up on rebuttal on Friday about  
11 this conclusion? Nothing.

12           In fact, originally when I asked him:

13           "Did you consider any analysis whatsoever of whether  
14 Walmart will cease to be the No. 1 price determinant for Kroger  
15 post merger?

16           "I didn't determine whether they were the No. 1  
17 factor pre- or post merger."

18           He didn't even analyze it.

19           Walmart is the everyday low price. Kroger  
20 price-checks Walmart in 100 percent of its overlap zones. We  
21 saw this at length, the documents that show that they  
22 price-check against Walmart, that they price based on Walmart.  
23 And the evidence shows that Walmart guides our pricing, and  
24 that evidence is unrebutted.

25           We heard in the plaintiffs' presentation about QFC in



## Closing Argument

1 the Northwest and Mariano's in Chicago. And of all of Kroger,  
2 these two divisions out of 23 are the only two that don't have  
3 Walmart as their lodestar, for historical reasons that aren't  
4 terribly important in this case. But do you know what? Those  
5 two divisions are being sent as part of the divestiture to C&S.  
6 So anything you see in the presentation about QFC, about  
7 Mariano's is utterly irrelevant. In fact, it's a red herring,  
8 because that's not what Kroger will be post merger. Post  
9 merger every single division of Kroger will follow what the  
10 corporate policy has been from day one, which is we are tied,  
11 guided, checked, and guarded by Walmart. So, again, we're  
12 done. There are no anticompetitive effects.

13 Similarly, but independently, real-world data shows  
14 Albertsons' prices did not affect Kroger's pricing. And this  
15 is simple, Your Honor. In the real world, you can do a natural  
16 experiment. We are going to take areas where there is an  
17 Albertsons and areas where there is not and say, "Are the  
18 prices different?" We can compare them. And Dr. Israel  
19 compared them and found there was no price difference.

20 Dr. Hill didn't offer an alternative. He didn't say,  
21 "I ran a different study with different parameters and came up  
22 with different conclusions." No, what he said was and what the  
23 plaintiffs have said was: "Well, this test is never done.  
24 What Dr. Israel did is not allowed under the law. It's  
25 inappropriate."

Closing Argument

1           It's bizarre that they would say that, because the  
2           FTC itself uses this test. For example, in FTC v. Staples,  
3           they used precisely this test to prove their point. So they  
4           use it when they prove their point, and they claim it doesn't  
5           exist when it proves their point doesn't work.

6           And how about Dr. Hill? I asked him about  
7           Staples/Office Depot, when he claimed "I've never seen this  
8           done before." And what was his response? He said he didn't  
9           read it or remember it. So we have Dr. Hill on the stand  
10          saying, "This is unheard of. This is unprecedented." And I  
11          bring up a case where it's not only not heard of and  
12          unprecedented, it was used by the FTC, and he said, "Sorry. I  
13          just don't remember that."

14          Again, they fail to meet their burden.

15          Let's talk finally about GUPPI and CMCR. It shows no  
16          harm to competition. This comes down to margins, Your Honor.  
17          The simple idea is the lower your profit, the less you can  
18          afford to lose customers by raising your prices. That's the  
19          simple logic behind this concept. There was a tussle in this  
20          case about what margins to use, what the profit measure was --  
21          gross margins or variable margins? Because, as we will talk  
22          about in a second, if you use variable margins, as you're  
23          supposed to, this merger is clearly not anticompetitive.

24          We saw this chart. Dr. Hill said in his report --  
25          and you heard counsel say today -- that there are 1,500

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1 problematic stores. But that number immediately goes down to  
2 693 if you use variable margins. In other words, if when  
3 you're figuring out how much money Kroger actually takes home,  
4 you actually take into account increased cost of hourly  
5 employees if they have to work stores more, because you have  
6 more customers, the supplies to service those customers,  
7 credit card fees, warehousing, transportation. If you take  
8 those into account, we make less money, and, of course, we take  
9 this into account. It was undisputed.

10 Mr. Groff and Mr. Maharroof: "Do gross margins  
11 capture all variable costs?

12 "No."

13 Then why did Dr. Hill use them? Because they prove  
14 the Government's point, whereas if you use variable margins,  
15 like you're supposed to, they prove ours.

16 And I asked Dr. Hill about this, about the fact that  
17 he used variable margins in previous cases.

18 In the Bertelsmann case -- "In Bertelsmann, you  
19 stated that the GUPPI methodology is explicit that you should  
20 include variable costs?

21 "Could be.

22 "Do you have any reason to doubt it?

23 "No."

24 Nor could he have any reason to doubt it, because  
25 that testimony is cited in the Bertelsmann opinion. Both the

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1 second score option model and the GUPPI model are explicit that  
2 one should use firms' variable margins. And look who the cite  
3 is to, Your Honor. It's to Dr. Hill. He knew in the past case  
4 he used variable margins. In fact, in Bertelsmann, he went  
5 farther. He told the Court, "With hindsight, I wish I had just  
6 gone through and tried to characterize them, the cost, as  
7 exactly what percentage is fixed, is variable."

8 He knew he should have done it then. He said it's  
9 explicitly required, yet he refused to do it here. If you do  
10 it, what you find is that the lower number, the 17 percent  
11 number, is the right number. And if you use that right number,  
12 we drop immediately from 1,517 problematic stores to 693.

13 But what about the divestiture? I asked Dr. Hill:  
14 "So if" -- meaning C&S -- "lowers the prices through price  
15 investment and spruces up the stores to the tune of  
16 \$1.2 billion, not only might it not compete with equal vigor as  
17 Albertsons stores, it might compete with greater vigor." And  
18 he said it's possible, but he didn't analyze that.

19 And as we've talked about, C&S intends, expects, and  
20 is positioned to do just that -- not just replace Albertsons,  
21 but compete with greater vigor than Albertsons. And so if you  
22 just factor in the divestiture, you go from 1,517 to 234.

23 And then I asked him: "You will confirm for me that  
24 nowhere on your chart you were asked the question what happens  
25 if we apply Dr. Israel's margin and assume a well-functioning

Closing Argument

1 divestiture, right?

2 "ANSWER: Correct.

3 "And when Dr. Israel did combine it, he came up with  
4 a number that I believe with four stores left, and you didn't  
5 quibble with the math that he did to your chart?

6 "Correct."

7 So far, we agree four stores. So those are the four  
8 stores that counsel mentioned in their closing in New Mexico,  
9 but they forgot to mention the following question and answer,  
10 Your Honor:

11 "And when you apply price zones to those four stores,  
12 you end up with zero stores that suffer competitive harm from  
13 this merger, right?

14 "That is correct."

15 That is their witness saying that their attorney  
16 argument about Santa Fe New Mexico is wrong. Zero. There is  
17 no anticompetitive effect.

18 Now, I want to talk briefly about efficiencies. Then  
19 I'm running out of time. I will talk about labor as quickly as  
20 the court reporter and my voice will allow.

21 Efficiencies. Efficiencies are really important,  
22 because if a company saves money or makes revenue that allows  
23 them to lower prices, that is pro-competitive. And so we have  
24 to measure whatever anticompetitive effect there might be  
25 against the pro-competitive effect. And if we save more money

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1 than we cost, if we pass that along to consumers, then the  
2 merger is pro-competitive. It's a good thing for the consumers  
3 we care about in this case. We talked about the reduction in  
4 cost, reduction of sourcing, merchandising, technology, and  
5 supply chain.

6 Your Honor, on a private screen, you see one example  
7 in national brands. This is the notion that Albertsons may  
8 have a better deal with Coke. We may have a better deal with  
9 Pepsi. And we know, in the real world, people went into a  
10 clean room and figured out that when the merger happens, we are  
11 going to save that amount of money that's in the red box on  
12 Your Honor's screen -- that amount of money in just one of the  
13 categories

14 Counsel called Smucker to try to debunk this notion.  
15 But Smucker did exactly the opposite. Smucker acknowledged  
16 disclosure of the information -- the stuff in the clean room --  
17 "would give Smucker's current and future customers a  
18 significant advantage in negotiating future agreements with  
19 Smucker's, right?

20 "ANSWER: Correct."

21 That's precisely the point. When the companies  
22 merge, they can get the best of each world. And they will save  
23 that money and much more.

24 In fact, the total, again, on your private screen,  
25 Your Honor, we see in the lower right-hand corner, a number

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1 that's on the left. And the high number, that's the band of  
2 verifiable and merger-specific efficiencies that Mr. Gokhale  
3 established. And why is that important? Because that money  
4 can then we used to turn around and help consumers. That's the  
5 money that helps pay for the billion-dollar-price investment.  
6 That's the money that the merger guidelines reflect should be  
7 considered by this Court in deciding whether or not there is an  
8 anticompetitive effect, because that's the money, as you can  
9 see here from our own board documents, that those efficiencies  
10 fuel the price investment.

11 And what happens? So suppose, Your Honor, you say,  
12 "You know, I'm a little skeptical the divestiture is going to  
13 work quite as well as you had hoped, defendants. It might not  
14 work at all." Well, helpfully, Dr. Hill -- remember, those  
15 store numbers, the 1,500 stores, 600 stores -- helpfully, he  
16 reduced those store numbers to dollar figures. And that's what  
17 you have on your screen. So rather than 1,500 stores, you have  
18 \$1.5 billion all the way down the waterfall.

19 So we can compare the efficiencies -- thanks to  
20 Dr. Hill -- of the merger against the purported cost. So he  
21 says that, with the divestiture, there is -- let's just look  
22 at -- I will make this quick, again, for time.

23 If you compare the billion dollars -- if the  
24 divestiture and Dr. Israel's margins are both validated by this  
25 Court, it's a billion dollars to three. With just a

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1 divestiture, it's a billion dollars to \$52 million. Suppose  
2 you totally discount the divestiture, Your Honor. You say,  
3 "Not only do I not think it will work well, I think it will be  
4 a failure." Well, Dr. Hill then says, "Well, the damage --  
5 assuming you use variable margins -- is \$323 million."

6 Your Honor, the efficiencies here triple that. You  
7 can completely discount the divestiture. You can completely  
8 discount it, and the billion-dollar price investment washes  
9 away any anticompetitive purported harm of this merger. Any  
10 way you look at it, this is a pro-competitive merger. Any way  
11 you look at it, this merger benefits consumers. Any way you  
12 look at it, there will be more money in consumers' pockets.  
13 There will be more money in workers' pockets, in associates'  
14 pockets. There will be safer communities. There will be more  
15 well-fed communities. They will be more secure communities if  
16 this merger goes through.

17 We can stop talking about likelihood of success now  
18 in the grocery market.

19 Let's turn briefly to the labor market, Your Honor.

20 To be clear, no case has ever enjoined a merger on  
21 this theory ever, and that's in part because the labor of a  
22 human being is not a commodity or article of commerce. But  
23 this is more fundamental. Let's assume it is. You have to  
24 start with the labor market the same way you start with the  
25 grocery market, which is: What's the market? What's the



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1 product? What's the geography?

2 Dr. McCrary said that union grocery labor in CBA  
3 areas is not a valid antitrust market. No one rebutted that.  
4 The only rebuttal we have to that is attorney argument, weaving  
5 together, cobbling together, taping, Scotch taping, failing  
6 tape, guide wire, random scraps of union labor testimony.  
7 There is no market.

8 Dr. McCrary's concentration argument, also  
9 unrebutted. There is no concentration. And whether the merger  
10 is likely to lead to harm for workers, again, he said "no," and  
11 that is unrebutted by any expert.

12 Why? Because Kroger and Albertsons compete in a  
13 broad market for labor. When Kroger looks to hire a new  
14 worker, they don't just go to grocery stores. They don't just  
15 go to places that have unionized labor, let alone going to  
16 places that have only unionized grocery labor. The market is  
17 incredibly broad, as every witness you heard from testified.  
18 There is no testimony from any witness that Kroger and  
19 Albertsons only compete for grocery union labor.

20 The data backs this up. When we look at where people  
21 used to work, when they come to Kroger and Albertsons, between  
22 1 and 2 percent used to work for a union grocery store. 98 to  
23 99 percent worked either at a place that wasn't a grocery  
24 store, that wasn't union, or wasn't both. That's the market.  
25 We're not competing against each other. And we can look at

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1 that for subsequent employers as well. When folks leave Kroger  
2 or Albertsons, where do they go? If there was a thing called a  
3 "union grocery market," you would expect the vast majority of  
4 those folks would go to another unionized grocery store. The  
5 evidence is they don't. 98.7 percent goes somewhere that falls  
6 outside of the Government's definition of "market." There is  
7 no mart.

8 The second part of their market definition is  
9 geographic. They say it's defined by collective bargaining  
10 agreement areas. Well, that just belies common sense. That  
11 would have workers driving from Bakersfield to San Diego to  
12 compete in the same market, or in other places, to not be  
13 willing to drive 15 minutes to look for a job. There is no  
14 support for the notion that CBAs are the proper geographic  
15 market.

16 The conclusion is the proposed merger would not lead  
17 to a worsening of those terms with respect to unionized  
18 employees as to competitive effects. Even if you accept there  
19 is a market -- remember, that's the first step -- there is no  
20 evidence. No expert has come into this court and said that no  
21 market exists -- not anybody.

22 But if it did, there is also no evidence of harm.  
23 And we saw this data, again, unrebutted, that if you compare  
24 areas with and without an overlap, wages are the same.  
25 Benefits are the same. We heard counsel say, "Well, there has

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1 got to be a reason that people join unions." And there is many  
2 reasons that people join unions, but it has nothing to do with  
3 the grocery union market. It doesn't exist. There are  
4 benefits to unions, and that's precisely why this merger is so  
5 important. Because we will preserve the unions. We will keep  
6 the unions. But if we lose sales to Walmart, union labor will  
7 lose their jobs. Walmart is not going to unionize. Amazon is  
8 not going to unionize. Costco is not going to unionize, Aldi  
9 is not going to unionize. That's what happens if this merger  
10 doesn't go through: Jobs are lost to non-union employers.

11 When we asked Dr. Ashenfelter about this fundamental  
12 conclusion:

13 "You don't address this?

14 "That's correct.

15 "You don't disagree with it?

16 "I did see -- I didn't analyze this set of issues."

17 As to bargaining tactics, Your Honor, we heard a lot  
18 about whipsaw bargaining, an awful lot. That has nothing to do  
19 with antitrust law. There is not a case out there that has  
20 ever said that the preservation of whipsaw bargaining has  
21 anything to do with antitrust law. But you can still whipsaw  
22 bargain against every other kind of employer -- union or  
23 non-union -- out there, if you choose to use that tactic. And  
24 we heard witness after witness say that.

25 And we also heard witness after witness say that, in

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1 fact, this merger will increase leverage of unions when they  
2 threaten a strike. Why? The bigger the union, the bigger the  
3 threat if you strike. And you don't have to take our word for  
4 it. Ms. Zinder, in her blog post that was in evidence, said,  
5 "It is precisely because of the large number of union members  
6 that Local 324 has been so successful in maintaining the pay  
7 and benefits that stands as the envy of the rest of the  
8 country."

9 That's what is being said outside the four walls of  
10 the courtroom. That's what is being said by folks that are  
11 talking directly to the members, not using this case as  
12 leverage to drive a better deal in the next collective  
13 bargaining agreement negotiations.

14 As Mr. King said: "The size and unity of the union  
15 membership is quite important. The larger the bargaining  
16 union, the more members the union represents, the greater  
17 leverage it has in the collective bargaining process." That  
18 conclusion was not disputed by anybody yet again.

19 Your Honor, I'm about to turn it over to Ms. Mainigi,  
20 I think close to on time, with the following, just to leave  
21 with you. Your Honor is obviously going to have post-trial  
22 briefing. I would like to thank you, most of all, for your  
23 extraordinary cooperation and patience with the parties. It  
24 has been an amazing experience for the defense. Thank you for  
25 the hospitality of your court staff. Thank you for your

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1   incredible time commitments. It has been special, and it has  
2   been important for those of us who believe in this merger that  
3   you have given us the opportunity to talk as fully and with the  
4   passion that we have.

5           The reason we believe in this merger is because of  
6   what it will do for the American people and the American  
7   worker. It will lower their prices. It will improve their  
8   stores. It will improve associates' salaries. No stores will  
9   close. More folks will be fed who can't afford to feed  
10   themselves. There will be no frontline job losses. Union  
11   contracts will be honored, because these companies honor  
12   unions. There will be more local food in your stores. There  
13   will be greater variety of local foods in stores down the road  
14   and across the country, which enures to the benefits of not  
15   just the farmers but the environment.

16           Your Honor, this merger matters. Again, thank you  
17   for your time.

18           MS. MAINIGI: Good morning, Your Honor.

19           THE COURT: Good morning.

20           MS. MAINIGI: While I'm setting up, I also wanted to,  
21   in advance, extend our heartfelt thanks to everybody on your  
22   staff and Your Honor for the tremendous amount of time and  
23   patience that you have given all of us. We are grateful.

24           So, Your Honor, I'm going to try to hit three  
25   different areas. They are not necessarily tied together: What

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1 happens if the merger doesn't go through and how is the public  
2 interest affected? Why the C&S divestiture will be a success.  
3 And then I will touch upon the competitive landscape.

4 So, Your Honor, I told you three weeks ago that if  
5 the merger does not happen, that that would be a bad  
6 development for Albertsons, its customers, its associates, and  
7 the communities that it serves, but it would also be terrible  
8 for the future of the supermarket industry.

9 Now, why would an injunction be bad for the industry?  
10 If we look at the commercial realities of where we are at this  
11 point in time, the industry has changed in ways that have made  
12 supermarkets extremely vulnerable, and the FTC says it wants to  
13 preserve the traditional supermarket channel for that very  
14 small group of people who supposedly still one-stop shop. And  
15 the way that the FTC proposes doing that is by blocking this  
16 merger.

17 But the commercial realities suggest that this is  
18 totally backwards, because the commercial reality is that this  
19 merger is the only way Albertsons can achieve the type of scale  
20 that would allow it to lower its prices enough to compete with  
21 Walmart, Costco, and Amazon. So if the FTC has its way and  
22 blocks this merger, it is actually making it harder for  
23 traditional supermarkets to survive and thrive in the very long  
24 term. So that will result in fewer options ultimately,  
25 Your Honor, for consumers. And giving consumers fewer options

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1 in the future is exactly what Section 7 of the Clayton Act is  
2 trying to prevent.

3 Now, what about Albertsons and the consumers and  
4 associates it serves? Well, the evidence at trial pointed in  
5 one direction only: The customers, associates, and communities  
6 that Albertsons serves will be far better off if this merger  
7 proceeds.

8 Now, Albertsons' CEO, Mr. Sankaran, came in, and he  
9 testified on this issue, and his testimony is uncontradicted.  
10 He explained that if the merger is blocked, Albertsons will be  
11 okay for the next two to four years. They will regroup; they  
12 will recalibrate. They will need to consider layoffs, he said.  
13 And chances are, they will need to consider store closures.

14 They will need to consider whether they have to exit  
15 some of the markets that they are currently serving. And as I  
16 said in my opening, Your Honor, change is coming for this  
17 company one way or the other, but plaintiffs have not shown you  
18 any evidence at this trial that Albertsons won't have to take  
19 those steps, much less any evidence that this "Plan B" world is  
20 in the public's interest.

21 Now, the FTC did try a little bit today, a little bit  
22 throughout this trial to make it seem like Albertsons could be  
23 fine without the merger if it just worked hard enough to lower  
24 its costs and its prices, and they tried to do that two  
25 different ways. They focused on the special dividend that

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1 Mr. Wolf alluded to that Albertsons paid its shareholders in  
2 2022, and they focused on various efforts Albertsons made like  
3 Project Edison, to cut costs.

4 So Mr. Sankaran explained that the decision to paper  
5 the dividend and the statements that he made to Congress about  
6 Albertsons' financial health came right on the heels of COVID.  
7 Here is his testimony on slide 4.

8 Now, the company's statements about its financial  
9 performance were true at that time. You've heard from multiple  
10 retailers, witnesses that every large grocer was doing well  
11 during COVID. But how the company was performing during COVID,  
12 Your Honor, unfortunately, says nothing about how it is  
13 performing today, and it certainly does not tell you how it  
14 will be doing in two to five years.

15 So the FTC also mentioned various cost-cutting  
16 initiatives and said, "Well, those would give you the same  
17 benefit of the merger." But what you've heard from multiple  
18 witnesses, including Mr. Sankaran and Ms. Susan Morris, is that  
19 Albertsons has tried to lower costs and tried to lower prices,  
20 and it has had some success. But those cost savings have been  
21 offset by rising costs in other areas, like utilities and labor  
22 and insurance.

23 And that's why Albertsons decided to proceed with  
24 this merger, because without the merger, Albertsons cannot get  
25 the type of cost savings it would need to lower its prices and



Closing Argument

1 really compete with the scale of someone like Walmart.

2           The industry is changing faster than Albertsons can  
3 keep up, Your Honor, and so this is not all about just doing  
4 the right things, as the Government alluded to. Albertsons has  
5 to make some kind of transformational change to remain  
6 competitive, and if it's not the merger, it will have to be  
7 some version of the options that Mr. Sankaran described, and  
8 that outcome, Your Honor, is plainly not in the public  
9 interest.

10           Now, let me briefly also address why the merger will  
11 help, not harm unionized labor. As we know, and as we have  
12 discussed, there is no unionized labor -- virtually none at  
13 Walmart, Amazon, and Costco. And Mr. Dan Dosenbach from  
14 Albertsons came in, and he testified that if the merger is  
15 allowed to happen, this will be a critically important  
16 development for union labor.

17           Slide 7, Mr. Simmons.

18           As you can see here, he explains, no matter what, if  
19 the merger isn't allowed to go through, the end result is going  
20 to be fewer union labor members.

21           Now, you also heard about that from Mr. Clay, from  
22 Local 555, who originally supported the merger. And Mr. Clay  
23 testified about a news letter that the union issued after the  
24 C&S divestiture was announced, and that testimony is shown on  
25 the slide on the screen here, Your Honor. And what the union

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1 was telling its members at that time was that if this merger is  
2 blocked, Albertsons could very well be bought by someone else,  
3 and that someone else most certainly would not be a union  
4 employer.

5 So what Local 555 told its members originally was  
6 they should think hard about who another buyer might be,  
7 because those union members would rather work for people who  
8 run grocery stores over online or big box retailers or any  
9 other employer who might not assume Albertsons' collective  
10 bargaining agreements.

11 So which world is in the public interest? A world  
12 with all the benefits that will flow from the merger, or a  
13 world in which Albertsons, as it currently exists, will be  
14 forced to undergo transformational change to survive, including  
15 change that will affect its customers, its associates, and the  
16 communities it serves? We suggest the answer on that point,  
17 Your Honor, is clear.

18 Now, Your Honor, I want to turn to the FTC's claim  
19 that C&S's divestiture will fail. The FTC could not be more  
20 wrong. C&S is getting the right people and the right assets to  
21 make these stores a success, and as a result, of the  
22 divestiture will bring a formidable new competitor to this  
23 industry.

24 Before I cover the evidence on C&S's ability to  
25 succeed, Your Honor, I want to pause on a fairly recent merger

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1 decision that gives some guidance on how courts should analyze  
2 the effect of a divestiture on competition, and that was a  
3 merger, Your Honor, between UnitedHealth Group and Change  
4 Healthcare in 2022, and that merger also involved a proposed  
5 divestiture that was a core aspect of the transaction. And DOJ  
6 was involved in that case, Your Honor. They challenged the  
7 merger, and the federal district court in D.C. rejected that  
8 challenge.

9 Now, one major reason the Court rejected DOJ's  
10 challenge was because of the effect of the divestiture on  
11 competition. Ms. Hall suggested that the divestiture fails --  
12 that the C&S divestiture fails under the law if it fails to  
13 preserve the status quo of competition, and we disagree with  
14 that, Your Honor. The evidence shows that the divestiture will  
15 increase competition. But regardless, she has the standard  
16 wrong. This slide shows -- this is from a different court. I  
17 think Mr. Wolf also cited something similar from another court,  
18 but this court in D.C. shows. "The question is not whether the  
19 status quo is preserved. The question is whether, as a whole,  
20 the transaction substantially lessens competition."

21 So that is the standard, Your Honor.

22 But coming back to the facts of this  
23 UnitedHealth-Change case, Your Honor, a big part of the  
24 conclusion that the Court reached there had to do with the  
25 people the divested business was getting. So the Court in that

Closing Argument

1 matter analyzed the divestiture, and it analyzed who was going  
2 to be going over to the divested company.

3 If we could put up slide 10.

4 As you can see from this slide -- -- there's a lot  
5 here. The Court explained that a large team of individuals  
6 with extensive experience managing the divested business will  
7 continue to work with the business post divestiture. And the  
8 Court there relied in particular on the fact that a senior  
9 leader, Carolyn Wukitch in that case, was coming over with the  
10 divestiture. And the Court said Ms. Wukitch was a core member  
11 of the business that was being divested. The Court spoke about  
12 her experience and expertise with all aspects of that business.

13 And the Court found that the fact that Ms. Wukitch,  
14 along with around 375 other individuals, the fact that they  
15 would all be conveyed with the divestiture to run the business  
16 day-to-day was powerful evidence that the divestiture would be  
17 successful and that it would be able to be able to compete from  
18 day one. And the Court went on to discuss those people in  
19 greater detail in its opinion, as you can see, on slide 12.

20 Now, I'm sure you can guess where I'm going with  
21 this, Your Honor. The reason this case matters is because this  
22 is the situation we have here with Susan Morris and the team  
23 that is going with her to C&S. When the FTC says that C&S  
24 doesn't have the right talent, they tend to only focus on the  
25 people who are working at C&S today and the retail experience

Closing Argument

1 that C&S has now. And that's what they did in their closing  
2 argument. That's what they did in the core of their case.

3 But as part of this deal, Your Honor, C&S is getting  
4 tens of thousands of people to run those stores and to run the  
5 business -- turn to slide 13. And that includes 67,000  
6 employees who are currently running the stores and the  
7 distribution centers C&S is getting in the deal.

8 And it also includes, Your Honor, thousands of people  
9 in the corporate office, all the way up to the leadership team  
10 that C&S is building to run this business at the top. Those  
11 are just a handful of the people in the leadership team.

12 Now, let me talk about Ms. Susan Morris, because her  
13 story is critical to C&S's future, and it is also very personal  
14 to Albertsons. You've heard from over a dozen witnesses in  
15 this hearing who have spent their lives working in and around  
16 the grocery industry, and not one of them has more experience  
17 in this industry than Susan Morris. Ms. Morris has spent her  
18 entire 39-year career in this industry, and her work has  
19 involved her in just about every single aspect of the grocery  
20 business.

21 She has been a clerk in stores. She has worked in  
22 pricing. She has managed stores. She has run entire  
23 departments of stores. She has worked in merchandising, in  
24 sales, and in marketing. She has run two divisions. And while  
25 she was a division president, she helped grow the company from

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1 200 stores, as of 2010, to 1,000 stores in 2013, and just a few  
2 years later, to the 2,300 stores Albertsons has today,  
3 Your Honor. And she is now overseeing all of those 2,300  
4 stores in her role as COO.

5 And even now, as a senior executive, Ms. Morris is in  
6 her stores to watch what's happening and figuring out how to  
7 make things run better. And you heard her talk when she came  
8 in to testify about the regular store visits she conducts and  
9 the time that she spends talking to the people working in those  
10 stores. And the vast majority of stores, Your Honor, 486 out  
11 of 579 that are being divested to C&S, those are Albertsons'  
12 stores, they are Susan Morris' stores, and they are coming with  
13 Susan Morris' people

14 Now, it's not just her resume, Your Honor, that  
15 qualifies her to run the divested business, because you also  
16 heard at trial from multiple witnesses about how well respected  
17 she is by everyone in the industry. You heard from  
18 Mr. Sankaran, Albertsons' CEO, who said Ms. Morris is "probably  
19 the most respected leader in the company; someone who gets it  
20 done, no matter what challenge is thrown her way."

21 You heard it confirmed by division presidents who  
22 have worked for her for years, who talked about how the people  
23 at Albertsons are excited about the possibility of going to  
24 work for Ms. Morris at C&S.

25 Todd Broderick was in here testifying, and he

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1 described Ms. Morris as "the brightest, smartest, best grocer  
2 I've ever worked with." And he said that the people in the  
3 stores that he oversees in Denver were all encouraged and  
4 excited when they learned that Susan was made CEO. And Kevin  
5 Curry said more of the same.

6 What the evidence at this hearing has shown is that  
7 there is just about no one more qualified than Susan Morris to  
8 run the divested stores and run them well. The fact that Susan  
9 Morris and all of these other people are coming with her to run  
10 this divested business, that's not just a nice fact. It should  
11 be a critical factor that this Court should consider in its  
12 consideration of the divestiture, because that critical factor  
13 completely undercuts one of the FTC's key theories of harm that  
14 will come out of this merger.

15 Now, the other big point the FTC tries to make is  
16 that C&S isn't getting the right assets to run a successful  
17 business that can compete with Kroger after the merger. The  
18 first point that the Government spent a lot of time on -- they  
19 made a big deal about it -- was the banners that C&S is getting  
20 and the stores that C&S will have to re-banner

21 The plaintiffs and their expert, Mr. Fox, tried to  
22 make it sound like that re-bannering is one of the hardest  
23 challenges that a company could face and that the scope of the  
24 re-bannering that C&S would have to do would make it very, very  
25 difficult for them to succeed. But that's not what the

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1 evidence actually showed, Your Honor.

2 First, as you've heard, less than half of the  
3 divested stores are actually going to have to be re-bannered,  
4 and for the stores that do have to be re-bannered, the majority  
5 are located in markets that already have one of the banners  
6 that C&S is acquiring, and you can see that from this slide  
7 here. So that leaves, Your Honor, about and at most 129 stores  
8 that C&S will have to re-banner in markets where a banner is  
9 not already present. So 129 out of 579, which is less than  
10 25 percent, and that's even by the FTC's count.

11 And you've heard Ms. Morris describe the many  
12 re-bannerings she's done over the course of her career, and  
13 that included 70 A&P stores Albertsons bought out of  
14 bankruptcy, which they re-bannered successfully in just a few  
15 months.

16 Now, based on her experience, Ms. Morris knows that  
17 there are ways to re-banner and to re-banner right. She has  
18 already, as she testified, thought about plans for ways that  
19 C&S can do that here, and she provided examples of that when  
20 she was testifying at trial. The other thing that she  
21 testified to, Your Honor, is that -- and other witnesses as  
22 well -- that the transition services agreement gives C&S the  
23 time they need to make that transition, that re-bannering  
24 thoughtfully and successfully.

25 So in addition to re-bannering, Your Honor, the



## Closing Argument

1 Government has said -- the FTC has said on private label, C&S  
2 is going to be at a huge disadvantage, because they won't have  
3 the same scope of private label offerings as Kroger and  
4 Albertsons at day one of the merger. But the evidence at trial  
5 actually shows that those concerns do not hold water.

6 So, first, Ms. Morris testified about the experience  
7 that she has had with developing private label products over  
8 the course of her career, and then she also talked about the  
9 private label brands that C&S already has and how she feels  
10 confident that C&S has everything it needs to build a strong  
11 private label portfolio with the assets that it's getting and  
12 the time it has to develop them. And she also talked about how  
13 common it actually is in the industry to retain third-party  
14 companies like TopCo to provide private label brands to  
15 companies that don't have their own.

16 The evidence at trial was that Walmart uses TopCo,  
17 Target uses TopCo, and some of the witnesses, like Raley's and  
18 Stater Brothers, even use TopCo. So again, their arguments  
19 about private label really are much ado about nothing.

20 The tech stack, Your Honor. As to the tech stack,  
21 Ms. Morris also explained that more than 80 percent of the  
22 stores being divested are already running on the exact system  
23 that C&S is acquiring. And for the stores that are not already  
24 running on this tech stack, C&S is getting the people with the  
25 right expertise to help those stores transition. So the FTC

Closing Argument

1     tried to solicit testimony about how hard things would be for  
2     C&S. But what you heard over and over again from Ms. Morris  
3     and others is that C&S will have the means to build and plan  
4     and execute on all of this.

5             Now, let me just briefly address the conspiracy  
6     theory that Mr. Wolf raised that C&S won't run these stores,  
7     just from Albertsons' point of view.

8             Again, let me come back to Ms. Morris, who explained  
9     that she had agreed to take on this new role as head of retail  
10    of C&S only because she was absolutely confident about C&S's  
11    commitment to running these stores. She got that commitment  
12    from C&S's owner, Rick Cohen, in her meeting with him. This is  
13    her testimony on that. And as you can see on the slide -- and  
14    you may recall, Your Honor, from the testimony, she asked him  
15    point-blank if he was going to buy the stores and sell them  
16    off, because she was not interested in that. And Mr. Cohen  
17    told her, "Absolutely not. We want to be in the grocery  
18    business."

19            And as she further testified, she would not be  
20    putting her very own people, the people that she has worked  
21    with for 35 years, on the line if she was not confident that  
22    C&S was both willing to run these stores and capable of doing  
23    so.

24            Now, on Haggen, Your Honor, the FTC has fizzled.  
25    They made a big deal in the opening about how they've seen this

## Closing Argument

1 story before with Haggen, who everybody said was going to be  
2 great, and then they ran the stores into the ground. They  
3 talked about how they were going to bring a witness, Naomi  
4 Oligario, to testify about her experience. But the FTC never  
5 called Ms. Oligario. In fact, they didn't bring any witness in  
6 this trial who could talk about Haggen from a position of  
7 experience as opposed to speculation.

8           They got some secondhand speculation from Stater  
9 Brothers, one union representative, Ms. Zinder, that thought  
10 she thought it was a mistake to tell union workers to go to  
11 Haggen. But there were no people who came in who had  
12 first-hand knowledge of Haggen. Instead, the only thing we  
13 heard from anyone who knew anything about this firsthand was  
14 from Susan Morris, again. Ms. Morris was a division president  
15 when the Safeway and Haggen merger happened. And she explained  
16 that there were a lot of important differences between Haggen  
17 and C&S.

18           Slide 19.

19           So there is a huge difference in the supply chain  
20 networks. C&S has a massive supply chain network that puts it  
21 on a whole different level than Haggen. Then the TSA, which  
22 gives C&S time to make transition, and, of course, all the  
23 personnel that we have discussed already that C&S is getting to  
24 run the stores.

25           So the only evidence that is in the record,

## Closing Argument

1 Your Honor, about the Haggen divestiture, shows that that  
2 divestiture has nothing to do with the type of facts we have  
3 here and that are present for the C&S divestiture. So the  
4 bottom line is that no matter how much plaintiffs try to say  
5 that C&S will not succeed, and one of the reasons is the Haggen  
6 divestiture, they do not have the goods to back that up.

7 So, Your Honor, let me turn to the competitive  
8 landscape, and that's obviously important, because it relates  
9 to the relevant market, and it relates to competitive harm in  
10 that market. And as you've heard, the FTC claims that there is  
11 a market for consumers who value visiting supermarkets and who  
12 like to fill up their baskets as one-stop shoppers. But the  
13 evidence that we have seen at trial has completely contradicted  
14 this particular theory. And let me walk through some of that  
15 evidence.

16 First, the Government is wrong about how consumers  
17 shop. How many stops are consumers making per week for their  
18 groceries has been something that has come up a few times  
19 during trial. In the Albertsons data that Ms. Kinney shared  
20 with you, it said they're making multiple trips per week. She  
21 came in here and testified that, today, the Albertsons customer  
22 makes an average of six trips per week for their grocery  
23 needs. So what does that mean for the Government's one-stop  
24 shopping theory? Well, as Ms. Kinney explained, if Albertsons  
25 customers were one-stop shopping, that trip count would be one,

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1 not six.

2 And then where are consumers shopping when they  
3 aren't shopping at supermarkets like Albertsons? Now, the  
4 Government gets this wrong also. They claim that stores like  
5 Albertsons and Kroger are in head-to-head competition for this  
6 very specific group of customers who prioritize a one-stop  
7 shopping experience. But we don't know who these supermarket  
8 superfans are. We have not seen any data emerge from the  
9 Government on that, and the Albertsons data suggests that they  
10 don't exist.

11 As Your Honor will recall from the share of wallet  
12 data, Albertsons customers spend 12 cents of every dollar with  
13 Albertsons and 88 cents of their dollar with other channels,  
14 like Walmart, Costco, and Amazon, as well as a long list  
15 of other retailers, and that's the effect of the channel  
16 blur.

17 So if consumers were engaging in one-stop shopping at  
18 supermarkets, this share of wallet data, Your Honor, would look  
19 very, very different. So that's one way we know.

20 Another way we know is the MULO+ data from Circana,  
21 which confirms this also. Again, Ms. Kinney explained that  
22 Circana, who is a third-party source, they classify retailers  
23 as food MULO and MULO+, and they've got a handful of grocers in  
24 food. They've got Target, Walmart, Sam's Club in MULO, and  
25 they recently added Costco and Amazon to MULO+. And for a long

## Closing Argument

1 time Albertsons received and focused on just the food data. So  
2 one subset, one part of that puzzle, and that's why you see a  
3 focus, as Ms. Kinney explained, in a lot of documents on a  
4 primary food competitor.

5 But the MULO+ data, once the MULO plus data was  
6 obtained -- unfortunately, the MULO+ data shows that they are  
7 losing a lot more share than they expected, and they're losing  
8 it to players that the Government says don't even compete in  
9 the relevant market, such as Costco and Amazon.

10 Now, the purpose and the function of the retailers  
11 that the Government brought in to testify in their case was to  
12 demonstrate that there are separate and distinct channels. But  
13 as you heard, the witnesses from all of those supposedly  
14 different channels, they all ultimately agreed that they are  
15 competing for the same share of wallet. They are competing for  
16 the consumers' grocery dollar against a long list of  
17 competitors that include themselves, that include Kroger, that  
18 include Albertsons, that include Walmart, Costco, and Amazon.  
19 And so they too -- the grocers that came in the FTC's case,  
20 they too are experiencing the channel blur that Albertsons has  
21 experienced.

22 Now, the FTC claims they didn't call the Walmarts,  
23 the Targets, the Amazon, and Costcos themselves because they  
24 offer a fundamentally different shopping experience. But the  
25 fact that some of these third parties might have a different

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1 go-to-market strategy than Albertsons does not mean that they  
2 don't compete with Albertsons, and the share of wallet  
3 demonstrates that.

4           So when you hear from the FTC that someone is outside  
5 of the market, because of the height of their ceilings or the  
6 concrete floors, because of the pallets, or because they sell  
7 organic chicken instead of Tyson's chicken, those are not  
8 tools, Your Honor, to opt out of competition in the market.  
9 They're tools to opt in.

10           So the Government gets it completely wrong as to what  
11 these consumers buy when they shop outside supermarkets, and  
12 you heard about this from the FTC in their opening. They say  
13 people go to certain places for certain specific products:  
14 Gatorade from one store; cases of water at another. And they  
15 say that not every store that sells groceries is a substitute  
16 for another one, but they offer no evidence to support this  
17 theory, Your Honor.

18           By contrast, what the Albertsons data shows is that  
19 when consumers leave supermarkets to buy a particular product,  
20 they end up filling their baskets with products in every  
21 category, not just toothpaste and toilet paper, but fish and  
22 fresh produce as well.

23           And as you saw from Ms. Kinney's analysis, Albertsons  
24 learned that once a customer went elsewhere to buy toothpaste,  
25 by only a year later their Albertsons basket had fallen by an

Closing Argument

1 average of 40 percent.

2 Now, the deep dive Ms. Kinney's team did on Costco  
3 showed this exact same phenomena. And you remember  
4 Ms. Kinney's headline she had: "Contrary to popular belief,  
5 Costco is a grocery store." And you remember the bar charts in  
6 her analysis showing that Albertsons' customers shopping at  
7 Costco weren't just buying certain products. They were buying  
8 products in every category, so not just cases of water as the  
9 FTC might suggest. They were buying eggs, they were buying  
10 milk, and they were buying fresh produce. And for many of  
11 those categories, Your Honor, the customers were buying more of  
12 it from Costco than from Albertsons.

13 So the FTC also completely misunderstands why  
14 consumers are shopping the way that they are, because the  
15 Government says that if Kroger and Albertsons combine, the  
16 merged company is absolutely going to be free to raise prices,  
17 because their biggest competitor will be gone, and that's their  
18 main theory of competitive harm -- increased prices.

19 Now, Mr. Wolf has already touched on Walmart, but it  
20 bears repeating again, that the Government completely ignores  
21 the effect that Walmart's scale and pricing has on the entire  
22 industry, not just Kroger, not just Albertsons, but the entire  
23 industry. But they didn't call Walmart to testify, we had to  
24 do that. And the commercial reality of Walmart's influence on  
25 price cannot be understated.



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1 I think Your Honor remembers from my opening the  
2 mac-and-cheese example. Walmart can sell mac-and-cheese  
3 cheaper than we can buy it. And it is no wonder that Walmart  
4 has become the largest grocer in America.

5 Even Mr. Fox, the FTC's own expert, wrote an article  
6 pointing out Walmart's dominance and the fact that it now gets  
7 one-out-of-four of every grocery dollars, and the result is  
8 that Walmart is pushing prices down, not up. They are the  
9 low-price setter in this industry, and everyone else is just  
10 trying to keep up as best they can.

11 But the problem is, Your Honor, Walmart is not alone  
12 anymore, because during the course of this trial you also heard  
13 about value retailers who are also growing rapidly and  
14 expanding in the industry by using their scale to drive prices  
15 down. So there are players like Aldi, Your Honor, who have  
16 more stores than Albertsons today and plan to open 800 more in  
17 the next four years, and they have the scale of an  
18 international company: And Dollar General, who has fresh  
19 produce in 3,000 stores, which is more than Albertsons' entire  
20 footprint, and they have plans to expand that fresh into 5,000  
21 stores by the end of the year.

22 And then, of course, we've only scratched the surface  
23 in this trial, Your Honor, of the rapid growth of e-commerce,  
24 which, as we heard from Ms. Kinney, is expected to grow at  
25 11 percent over the next ten years while brick-and-mortar only

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1 grows 1.6 percent.

2           So in the future, Your Honor, these trends are only  
3 going to accelerate and add even more downward pressure on  
4 price. The grocery dollars in this industry are shifting more  
5 and more away from supermarkets and toward the low-cost players  
6 with scale. And they're shifting towards the e-commerce  
7 platform, such as Amazon, which the Government, of course,  
8 excludes from both of its markets. And that shift also is  
9 going to keep downward pressure on price,

10           And the future matters, Your Honor. The future  
11 matters here in your analysis, because what all of the  
12 antitrust authority says, and that's both cases and the merger  
13 guidelines themselves, is that the Court must look to the  
14 probable future.

15           So as we try to analyze a future world both with and  
16 without a merger, the evidence in this case has been consistent  
17 that the industry is only going to get more and more  
18 competitive in the future, and the ability to compete on price  
19 is one of the key factors, and it is what this merger offers.  
20 And that ability is exactly what these companies will need to  
21 survive and thrive in an industry that is hyper-competitive  
22 today and will only get more so in the future.

23           Thank you, Your Honor

24           THE COURT: Thank you.

25           You have rebuttal.

1 I assume you want a break?

2 MS. MUSSER: A five-minute break would be lovely.

3 THE COURT: We can take ten.

4 All right. I'm feeling generous today.

5 (Recess.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/ Dennis W. Apodaca  
DENNIS W. APODACA, RDR, RMR, FCRR, CRR  
Official Court Reporter

September 17, 2024  
DATE

"ANSWER: [7] 3514/4 3520/23 3535/11  
3536/24 3537/20 3544/1 3545/19  
MR. WOLF: [1] 3499/5  
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